IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 224 of 1994

The State of Maharashtra ...Appellant

V/s

1. Sidharam Devanappa Survase,
2. Nagappa Mhalappa Bansode,
3. Revanappa Khandappa Survasse ..Respondents

(Orig.Accused 1,3 and 4)

Shri B.H.Mehta,APP for Appellant

Smt.Rachita Dhuru Advocate appointed for Respondent is absent.

CORAM:S.S.PARKAR AND

S.R.SATHE,JJ.

DATED:24th Sept. 2004

ORAL JUDGMENT :- (Per S.R.SATHE,J.)

1. The State of Maharashtra has filed this appeal against the judgment and order passed by the Court of 4th Additional Sessions Judge, Solapur in Sessions Case No.70 of 1993, whereby all the accused (accused nos. 1 to 4) were acquitted of

the offence punishable under Section 307, 324 read with 34 of IPC and section 135 of Bombay Police Act.

2. Brief facts giving rise to this appeal are as under :

. In the year 1989 Grampanchayat elections were held at village Nandani, District Solapur. One Tukaram Survase and accused no.3 Nagappa contested the said election from one and the same ward. There were two groups in the said election. One was led by Tukaram and other was led by one Dharmappa Survase and accused no.3 Nagappa. PW 8 Mahadeo Koli and PW 10 Kuber Narote (injured persons in the present case) canvassed for the candidates of the group of Tukaram and Dharmappa. As a result of the same accused no.3 Nagappa and accused no.4 Revanappa were annoyed. About one month prior to the incident dated 8-8-1992 chapter cases were filed against PW 10 Kuber and Raju Sane of one group and accused nos.1 and 2 of the opposite group. On 7-8-1992 at about 10-00 p.m. PW no.8 Mahadeo and PW 10 Kuber were sleeping on one bed at the ground in front of Primary school, Nandani. PW no.6 Tipanna, PW 7 Pundlik, PW no.11 Babu and some other persons were also sleeping on the same ground. On 8-8-1992 at about 1 to 1.15

a.m. P.W. 10 Kuber Narote woke up on sustaining injuries to his neck and left jaw. At that very

time Mahadeo who was sleeping near Kuber also woke up as he sustained injury to his right hand. They found that accused no.1 Siddram was standing near them with an axe in his hand. Accused no.3 and 4 were also standing there, when accused no.3 shouted "Kuber has not died as yet", the accused no. one Sidharam gave a blow with an axe on the neck of Kuber and ran away. As a result of the assault Kuber became unconscious. PW 8 Mahadeo and other persons took Kuber to his house and then to the police Station Mandrup. From there he was sent to Primary Health Centre, Mandrup. Doctor on duty examined him. In the meantime PW 8 Mahadeo went to Mandrop Police Station and lodged complaint. PSI Jadhav recorded the said complaint at 2-30 a.m. and registered C.R.No.24/1992 for the offences punishable under Section 307, 324 read with 34 of IPC and 135 of Bombay Police Act.

3. As the condition of Kuber was serious he was shifted to General Hospital, Solapur where Dr.Gurappa Nakamute examined him and admitted there as an indoor patient. He was in the said hospital from 8-8-192 to 9-11-1992 and thereafter again for some period.

4. After registering the complaint in the morning of 8-8-1992 PSI went to the place of offence and drew panchanama of the place of offence. At that time he found blood stains at the said place and 2 teeth and 2 molars. He seized the same under panchanama and also collected the earth containing blood from the said place. On that day he searched for the accused no.1, however, he was not found. The Police recorded the statements of some witnesses and got produced the clothes of injured persons. Police arrested the accused on 9-8-1992. The attached articles were sent to C.A. For several days the injured Kuber was not in a position to speak. However when he was in a position to speak, Police recorded his statement. After completion of investigation Police submitted charge sheet against the above mentioned 4 accused for the offences mentioned above.

5. Finding that the accused are charge sheeted for the offence punishable under Section 307 of IPC which is exclusively triable by the Court of Sessions, the learned Judicial Magistrate, F.C., committed the case to the Sessions Court, Solapur.

6. The 4th Additional Sessions Judge, Solapur framed charge Exh.2 against the accused for the offences mentioned above. The charge was read over and explained to the accused. All the

accused pleaded not guilty and claimed to be tried. From the suggestions put to the PWs and from the statements of accused recorded under section 313 of Criminal Procedure Code it appears that defence of the accused was of total denial. According to them there were two groups in the village and they were of the opposite group hence the injured persons falsely implicated them.

7. In order to bring home the guilt of the accused, the prosecution examined as many as 14 witnesses consisting of complainant Mahadeo Koli Exh.25, Injured person Kuber Exh.32, 3 eye witnesses viz. Tipanna Dhomnale Exh.23, Pundlik Survase exh.24, Babu Survase Exh.33, 3 panch witnesses viz. Malkarjun Haridas Exh.14, Manik Dudhale Exh.16 and Nagayya Swami Exh.12, 3 medical officers viz. Gurappa Nakamute Exh.10, Balbhim Narsude Exh.27 and Dr.Sublaxmi Jaiswal Exh.52, Circle Officer Bhutal Kale, Exh.19, 2 Police witnesses viz. Head Constable Shaukat Shaikh Exh.34 and Investigating Officer Vitthal Jadhav Exh.39. The prosecution also produced medical certificates of injured persons at Exhs 11 and 29. Panchanamas at Exh.13, 15, 17 and 18, map of place of offence Exh.21. C.A. reports Exh.44 to 47 and some other documents. As against this the accused did not produce any evidence in defence.

8. After considering the prosecution evidence on record and hearing the arguments of both the learned Advocates, 4th Additional Sessions Judge, came to the conclusion that presence of complainant Mahadeo at the place of incident was doubtful. The prosecution did not adduce sufficient evidence to prove the guilt of accused. He therefore acquitted all the accused of the offences with which they were charged.

9. The State of Maharashtra has challenged the above mentioned order in this Criminal appeal. In this appeal before us, the learned APP has urged 2 points. Firstly, he submitted that learned trial Judge has not properly appreciated the evidence on record and has wrongly held that presence of complainant at the place of offence appeared doubtful. Secondly, he canvassed before us that learned Additional Sessions Judge has given undue importance to the fact that there was no date mentioned in the relevant entry in case diary. Similarly undue weightage was given to minor discrepancies in the depositions of witnesses. According to the learned APP there was in fact sufficient evidence at least to connect the accused no.1 with the alleged crime. He therefore submitted that atleast appeal against accused no.1 be admitted and accused no.1 be convicted for the offence with which he is charged.

10. In this appeal, though accused nos 1, 3 and 4 were served with notice of this appeal, they did not engage any Advocate hence office was directed to appoint one Advocate from the panel of advocates for accused nos. 1, 3 and 4. Accordingly Smt. Dhuru, Advocate was appointed for accused nos.1, 3 and 4. However, when above matter was called for hearing the said Advocate was absent, hence learned APP took us through the entire evidence, the judgment of the trial Court and the appeal memo.

11. From the perusal of evidence on record it is very clear that in the year 1989 grampanchayat elections were held at village Nandani. Prior to that election, one Tukaram was sarpancha of the said village in the year 1989. Then accused no.3 Nagappa was elected as sarpancha. Tukaram and Dahrmappa were defeated in the said election. PW 8 Mahadeo and injured person Kuber Narote PW 10 Exh.32 had canvassed for Tukaram in the said election. Thus, admittedly, there were 2 groups in the said village. The complainant Mahadeo and injured Kuber were of one group while accused no.3 was of other group.

12. Injured person Kuber Narote Exh.32 has stated that on the night of 7-8-1992 he and complainant

Mahadeo Exh.25 were sleeping at the ground of primary school on one bed. At that time PW 6, 7 and 11 were also sleeping at the said ground along with some other persons. All these witnesses have stated that on that night Kuber was assaulted and he sustained injuries to his jaw and neck and hence he was sent to Primary Health Centre, Nandani. At that time doctor on duty found following injuries on his person, viz.

> 1, Incised wound on anterior aspect of neck above cricoid cartilage transererse extending from left to right from sternomastroid middle third,tracheas cut, bleeding was present, size 5" x 3" gaping present, margins linear.
>
> Incised wound with exfoliated teeth on left cheek on lateral angle of mouth through and through oral cavity open. Size 3" x 1" Left upper 3, 4 and 5 canine, and two premolars, left lower 2,3,4,5 - second incisor canine, and two pre molars.
>
> 3. Incised wound on lower lip right side Size 1/2" x 1/4"

. He has stated that above injuries could be

caused due to axe with handle.

13. The said injured person was even subsequently examined by other 2 doctors viz. Dr.Balbhim Naganath Narsude Exh.27 and Dr.Subalaxmi J. Jaiswal Exh.52. They have also stated that Kuber had sustained grievous injuries mentioned above and for that purpose he was admitted in the Civil Hospital at Solapur. So, from all this evidence it is very clear that in between 7-8-1992 and 8-8-1992 Kuber Narote sustained grievous injuries as a result of the blows with an axe.

14. The main and material question is whether the above mentioned injuries were sustained as a result of axe blows given by the accused. At the outset it must be mentioned that there was absolutely no evidence on record to connect the accused no.2 with alleged crime. Similarly the evidence against accused nos 3 and 4 was also not sufficient to connect them with alleged crime. Even the learned APP also could not point out any cogent evidence against accused nos.3 and 4, showing their involvement in the alleged offence. The learned Additional Sessions Judge, Solapur rightly held that there was no sufficient material to connect accused nos 2 to 4 with the alleged crime and as such acquitted them. So, there is no necessity to interfere with the said finding.

15. The learned APP strenuously argued before us that the complainant Mahadeo Koli Exh.25 has specifically stated that at the relevant time he sustained a blow on his right hand finger and so he woke up and shouted and at that time he found that accused no.1 was standing near them with an axe in his hand. He has also stated that when accused no.3 said that Kuber has not died, accused no.1 gave a blow with an axe on the neck of Kuber and as a result of the same Kuber sustained grievous injuries and became unconscious. This evidence of complainant is also corroborated by injured Kuber and other witnesses and as such the trial Judge ought to have held that offence against the accused no.1 is proved.

16. From perusal of the judgment of the trial Judge it appears that he has held that presence of Mahadeo at the place of offence appeares to be doubtful. For that purpose he has taken into consideration two factors. Firstly, he has observed that the complainant Mahadeo has stated that he had received injury to his right hand as a result of blow given with an axe as at the relevant time his right hand was on the cheek of Kuber. According to the learned Judge it is evident that the blow which was received by the injured person on cheek was very severe and as a

result of the same two teeth and 3 molars of Kuber had fallen. As compared to the said injuries, injury sustained by Mahadeo was minor. So according to him the story given by Mahadeo in this behalf was not reliable. Besides this, learned Judge has observed that if really Mahadeo had sustained injury at that very time and if he had accompanied injured Kuber to Police Station then both of them would have been sent to Primary Health Centre simultaneously. In the instant case admittedly injured witness Kuber was sent to Primary Health Centre at about 2-00 a.m. on 7-8-1992 while the complainant Mahadeo was sent on 8-8-1992 in the morning. The learned Judge has given much importance to this point. However, while doing so he has ignored the fact that admittedly Kuber had sustained very serious injuries to his cheek as well as to his neck. It was absolutely essential to give immediate treatment to Kuber, police therefore, immediately sent the injured Kuber along with Police Yadi to Primary Health Centre and witness Mahadeo was detained in Police Station for recording his complaint. Accordingly , we do find that Mahadeo has lodged a complaint in the Police station at 2-30 a.m. PSI Jadhav Exh.39 has categorically stated that Mahadeo had been to the Police Station along with Kuber and then he sent Kuber to Primary Health Centre and recorded the complaint of

Mahadeo. The evidence of Mahadeo and PSI Jadhav, in this behalf is not at all shaken or shattered in the cross examination. It seems that the learned trial Judge has perused the station diary and according to him there was entry about the offence in question in the station diary but no specific time was mentioned. However, there is no sufficient material on record to show that there was any manipulation in the said station diary. What is more to be noted is that there is a positive evidence on record to show that complaint was registered on 8-8-1992 at about 2-30 a.m. and before that injured Kuber was sent along with Police Yadi to Primary Health Centre. Even Dr.Bablabhai Narsude Exh.27 who was on duty at Primary Health Centre Mandrup has also stated that on 8-8-1992 at about 2-30 a.m. he examined witness Kuber who had come with Police Yadi. Besides this, the other 3 eye witnesses viz. Tipanna Dhomnale Exh.23, Pundlik Survase Exh.24 and Babu Survase Exh.33 have also specifically stated that on that day at night when they were sleeping in the ground of Primary Health Centre the complainant as well as Kuber Narote were sleeping there on one bed. So, there was sufficient evidence on record to hold that on the day of incident complainant Mahadeo as well Kuber were sleeping on one bed in front of the Primary school. We have absolutely no hesitation to hold

that finding recorded by the learned trial Judge in this behalf was not at all warranted from the evidence on record.

17. It appears that the learned trial Judge has observed that there is no consistent evidence to show that at the place of offence there was sufficient light. According to him at some places the witnesses have said that on the electric poll there was bulb while, some witnesses have said that there was tube light. In our view, such discrepancies are bound to occur.What is material is whether at the relevant time there was electric light or not and whether it was sufficient to have the witness an opportunity to see the assailants. It is clear from the evidence of witnesses and map Exh.21 that there was electric light near from the place of incident. Admittedly, the assailant viz. accused no.1 was known to injured Kuber and Mahadeo as well as to other 3 eye witnesses for a long time. Merely because in earlier statement no reference was made to electric bulb or electric tube it cannot be said that evidence of Mahadeo is not trustworthy. Infirmity in that behalf is not at all material which would go to the root of the matter. All that has to be seen is whether the witness has stated that at the relevant time there was light and as a result of the same he could see the assailant. Bearing in mind this position if

we look to the evidence on record it is very clear that complainant as well as injured Kuber so also 3 eye witnesses have clearly stated that at the relevant time there was electric light in which they could see the assailants. In fact all of them have clearly stated that they saw the accused no.1 at the said place. The complainant has in fact stated that he actually saw the accused no.1 giving blow with an axe to Kuber on his neck. The other 3 eye witnesses have stated that they saw accused no.1 running away from the said place. If we see the map Exh.21 drawn by Circle Inspector, it is very clear that at a distance of 80’ to 100’ ft. on both sides there were two electric polls.

18. In the instant case we find that FIR is lodged within 1 hour from the incident and it is clearly mentioned therein that accused no.1 gave blow with an axe on the cheek and neck of Kuber. It is difficult to believe that within such short time complainant would hatch a plan to involve the accused falsely. Prompt lodging of FIR in the instant case also lends support to the prosecution version.

19. It is true that in the instant case though prosecution has proved that there were two factions in the village and the accused persons were belonging to one group while injured persons

were belonging to other group, there is no other evidence to come to a definite conclusion that the said rivalry was the motive in committing the alleged crime. However, it is well settled that when there is cogent and consistent evidence and that too of eye witnesses, there is no need for the prosecution to prove the motive and in such a case absence of motive cannot be fatal to the prosecution case. Similarly, in the instant case though the prosecution has brought on record that weapon used in the commission of offence has been produced by the aunt of accused no.3 and the same has been attached under panchanama and it was found blood stained, we hold that there is no cogent evidence to show as to how this axe was produced by accused no.3's aunt. Be that as it may, the fact remains that even if there is no proper evidence regarding production of weapon there is other ample evidence on record which clearly establishes that accused no.1 gave a blow with an axe to injured Kuber and caused injuries as mentioned above.

20. It has to be noted that the accused no.1 has attacked the injured Kuber at night when he was sleeping. He has given 2 blows and that too on vital parts, such as cheek and neck. Both the blows were given with such force that it caused grievous injuries to Kuber and he became

permanently disabled. He was required to be hospitalised for a long period. So, we have no hesitation to hold that the prosecution has proved that accused no.1 is guilty of the offence punishable under Section 307 of IPC. The learned trial Judge has however failed to appreciate the evidence in proper perspective. Though there was no evidence to connect the accused nos 2 to 4, it was necessary for the learned trial Judge to scan the evidence and to sift the truth from falsehood and to come to the conclusion that offence against the accused no.1 is duly proved. However, the learned trial Judge failed to do so and naturally reached to a wrong conclusion in respect of accused no.1. 21. From the evidence on record it is clear that intention of the accused no.1 was to kill Kuber and that is why he assaulted Kuber with deadly weapon on vital parts. It seems that while giving blows to Kuber complainant sustained injury to his right hand, so question may arise as to whether the accused no.1 has committed any offence in relation to complainant Mahadeo. While considering this aspect, one must keep in mind the doctrine of transfer of malice or transmigration of motive. As per the said doctrine a man who has an unlawful and malicious intent against another, and,in attempting to carry it out, injures a third person, he is guilty of what the law deems malice against the person injured. So, in the instant

case having regard to the fact that Mahadeo has sustained minor injury while accused no.1 was giving blow with an axe to Kuber, we have no hesitation to hold that accused no.1 is also guilty of the offence punishable under Section 324 of IPC.

22. Though accused were charge sheeted for the offence punishable under Section 135 of Bombay Police Act, admittedly, the prosecution has failed to adduce any evidence in that behalf and the learned trial Judge has rightly acquitted the accused for the said offence.

23. In this view of the matter, the appeal is partly allowed.

. The order passed by the Court of IVth Additional Sessions Judge,Solapur acquitting the accused no.1 of the offences punishable under Section 307 read with 34 and Section 324 read with 34 of IPC is set aside. The accused no.1 is convicted for the offence punishable under Section 307 of IPC and is sentenced to suffer r/i for 5 years and to pay fine of Rs.10,000/- in default to suffer r/i for one year. Fine, if recovered,amount of Rs.5,000/- be paid to the injured Kuber Shivaji Narote. The accused no.1 is also convicted for the offence punishable under

Section 324 of IPC and is sentenced to suffer r/i for 3 months and to pay fine of Rs.500/- and in default to suffer r/i for 15 days. Substantive sentences to run concurrently. The accused no.1 is entitled to get set off for the period of detention undergone by him as per Section 428 of Cr.P.C. The accused no.1 to surrender his bail forthwith.

. The accused no.1 is acquitted of offence punishable under Section 135 of Bombay Police Act.

. The appeal against the accused nos.2 to 4 stands dismissed.

. The order passed by IVth Additional Sessions Judge, Solapur acquitting the accused nos.2 to 4 of all offences, is confirmed.

. The bail bonds of accused nos.2 to 4 stand cancelled.

(S.S.Parkar, J.)

(S. R. Sathe,J.)